IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. .....

G. A. ROSCHEK,

Petitioner,

vs.

STELLA E. WILLIAMSON,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinion of the Court Below.

The opinion herein of the Circuit Court of Appeals for the Seventh Circuit is reported in 142 F. (2d) 542 (Advance sheet No. 4). The same is likewise set forth in full in the record herewith (R. p. 82).

Statement of Jurisdiction.

A full statement respecting the asserted jurisdiction of this Court is set forth in the preceding Petition for Writ of Certiorari under topic II, which statement is made a part of this brief by reference.

Concise Statement of the Record.

This has already been stated in the preceding Petition under topic I and is made a part of this brief by reference.

Specifications of Error.

1. The Circuit Court of Appeals committed error herein by its affirmation and approval of the action of the trial court in refusing peremptorily to instruct the jury, at petitioner's request and at the close of all the evidence, to return a verdict for petitioner.

2. The incontroverted evidence established respondent's liability as a matter of law and the Circuit Court of Appeals indulged error in failing to give recognition to this rule as established by previous decision of this Court.

Summary of Argument.

I. The decision of the Circuit Court of Appeals that liability does not attach, as a Matter of law, to the Record Transferee of National bank stock where the Transferee was without original knowledge of the transfer but subsequently accepts and appropriates dividend checks therefrom, made payable to the Transferee and drawn by and upon the National Bank, with knowledge or a patent opportunity for knowledge that the dividends resulted from the stock in question probably conflicts with a decision of this Court.

II. Ultimate facts in the case at bar, established either by stipulation or incontroverted evidence, make for liability under the formula of *Keyser* v. *Hitz*.

ARGUMENT.

Point I.

The Decision of the Circuit Court of Appeals That Liability Does Not Attach, as a Matter of Law, to the Record Transferee of National Bank Stock Where the Tranferee Was Without Original Knowledge of the Transfer But Subsequently Accepts and Appropriates Dividend Checks Therefrom, Made Payable to the Transferee and Drawn By and Upon the National Bank, With Knowledge Or a Patent Opportunity For Knowledge That the Dividends Resulted From the Stock in Question Probably Conflicts With a Decision of This Court.

We regard the case of *Keyser* v. *Hitz*, 133 U. S. 138, as the controlling authority in support of the foregoing assertion of law. In that case, stock was placed in the name of Mrs. Hitz by her husband. It was not distinctly shown by the evidence that the stock certificates were ever in her possession. It was shown, however, that Mrs. Hitz had endorsed dividend checks to her husband. Mrs. Hitz claimed that she never bought, owned, or voted any of the bank stock and never knew, until after the failure of the bank, that her name appeared among the stockholders on the books of the bank; that she never received any dividend paid and never received any certificates of stock. She denied seeing the checks for the dividends but was unable to deny that the signatures endorsed upon the checks constituted her signature.

The dividend check read as follows:

> "Pay to Jane C. Hitz or order $800.00, fourth dividend payable this day on stock standing in her name on the books of the bank and charged to dividend account No. 3300."

Upon these facts, this Court announced those propositions of law bespoken in the three following quotations from the opinion:

> "If she became aware of the transfers, after they were made, and thereafter received the dividends, she became a shareholder for all purposes of individual liability in respect to the contracts, debts and engagements of the bank, as fully as if the transfers had been made originally with her knowledge and consent. Whether she received the dividends or not depended upon the inquiry as to whether the checks for them were endorsed by her. If she endorsed them, or either of them, she is estopped to say she did not know their contents, and was not the owner of the shares of stock upon which the dividends were declared; for each check discloses upon its face that it was payable to her order, and was for dividends on stock standing in her name on the books of the bank."
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> "But if, after the transfers, she * * * in any * * * mode approved, ratified or acquiesced in such transfers or accepted any of the benefits arising from the ownership of the stock thus put in her name on the books of the bank she was liable to be treated as a shareholder with such responsibility as the law imposes upon the shareholders of National banks."
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> "It is sufficient on this point to say that the record made of the transfers upon the books of the bank was sufficient, as between her and the bank, to work a change of ownership, and new certificates were not necessary to her becoming the owner of the stock so transferred."

By the foregoing assertions, this Court recognized that dividends, as the produce of invested capital, are a fundamental incident and a primary objective of stock ownership. The acceptance and appropriation of stock dividends is consonant only with the relationship which arises from

the ownership of the stock upon which the dividend is declared. It is inconsistent with any other or different relationship to the issuing corporation. One cannot accept the benefits of stock ownership and disavow the burdens thereof.

The precise difference of opinion in the case at bar between the Circuit Court of Appeals and Petitioner resides in the fact that the Circuit Court of Appeals, as disclosed by its opinion, believes the case of *Kyser* v. *Hitz, supra,* to be applicable only where the face of the dividend check affirmatively states that it is issued "for stock standing in the name of respondent on the books of the bank". Thus, the Circuit Court of Appeals delimits the operative ambit of the case of *Keyser* v. *Hitz* to an instance in which *all* of the salient facts are reflected on the face of the dividend check itself. Petitioner disagrees, believing that *Keyser* v. *Hitz* established a broader principle of law, namely, that the person to be held liable must have had knowledge, information or patent access thereto, either from the face of the check or otherwise, which extended knowledge or a ready opportunity for knowledge that the stock stood in the name of such person.

The foregoing second paragraph of quotation from the opinion in *Keyser* v. *Hitz,* as we believe, sustains petitioner's contention for a broader application of its precepts than that accorded by the Circuit Court of Appeals . This Court said that "if, after the transfers, she * * * *in any* * * * *mode* approved, ratified or acquiesced in such transfers * * *" liability would attach.

Petitioner further feels justified in construing *Keyser* v. *Hitz* as authority for sustaining liability not along where there is subsequently acquired actual knowledge that stock has been transferred to the name of the person asserted as liable but also where such person had a patent oppor-

tunity for knowledge. Mrs. Hitz expressly denied having actual knowledge that the stock stood in her name and denied having seen the dividend checks. Thus this Court predicated liability on the basis that she had a ready access to knowledge through that which appeared on the checks.

Point II.

Ultimate Facts in the Case at Bar, Established Either By Stipulation or Incontroverted Evidence, Make For Liability Under the Formula of Keyser v. Hitz, Supra.

If, as petitioner believes, the case of *Keyser* v. *Hitz*, *supra*, establishes the proposition of law asserted at Point I of this brief, the sole remaining question is whether or not the requisite elements of liability as set forth therein were established by stipulation or undisputed evidence in this case. If those elements were so established, there was no question of fact to be resolved by the jury and a binding instruction should have issued from the trial court at petitioner's request.

That the stock in the case at bar stood in the name of respondent on the books of the corporation was stipulated (R. p. 13). It likewise was stipulated that respondent receiver, endorsed and cashed two dividend checks, each showing upon its face that it was a dividend check, drawn to the order of respondent by and upon the banking corporation which declared those dividends (R. p. 15, p. 63). Respondent testified that she had no other stock of any kind from which the dividends could have been derived (R. p. 30). Respondent further testified that she supposed that if she received a dividend at all it would be a dividend on the bank whose stock is here involved (R. p. 30). These facts are undisputed and are free of contrary evidence. Therefore, the jury had no issue of fact to try upon these points.

If the undisputed facts above stated fall within the rule as laid down by the Keyser case, and we sincerely believe those incontroverted facts establish every element of that rule, respondent was liable as a matter of law. That it is the inescapable duty of the trial court to issue a peremptory instruction where the incontroverted evidence establishes liability as a matter of law is so fundamental a rule that the citation of supporting authority is unnecessary.

In both the case of *Keyser* v. *Hitz* and in the present matter, the marginal notations on the dividend checks affirmatively disclosed that they were in fact dividend checks. The checks in *Keyser* v. *Hitz* however, also disclosed that they were issued on stock of the bank standing in the name of Mrs. Hitz. That fact did not appear on the checks here in issue but the same fact was disclosed or made readily accessible to respondent from other sources, namely, the face of the checks themselves, coupled with her extraneous, admitted personal knowledge. These checks were drawn *by and upon* the New Albany National Bank as dividend checks and so labeled. Therefore, she knew or could have known that they were dividend checks and had some nexus with that bank. Respondent admitted that she had no other stock in any corporation and, further, that she supposed that if she received a dividend at all (it was stipulated New Albany National Bank. We feel these undisputed facts conveyed to respondent a knowledge as full and complete as that which was conveyed to Mrs. Hitz by the legend on the latter's dividend check.

There are but two persons who could have owned this stock, namely, the respondent or her deceased husband. It is the contention of respondent that this stock was owned by her deceased husband and that she was without ownership thereof at any time. The undisputed evidence is that respondent was administratrix of the estate of her deceased

husband and that in the administration of his estate she filed verified inventory and final accounting. The undisputed evidence further reveals that neither the inventory nor the final accounting takes cognizance of the stock in question or its dividend accretions. If this stock was owned by the deceased husband, as respondent contends, it was the clear duty of respondent, as administratrix, to inventory and account for the stock and account also for the dividends. The probate code of Indiana, Burns' Indiana Statutes of 1933, Section 6-701, in essence provides that an administrator shall make out a true and complete inventory of the personal estate of the decedent which shall have come to his knowledge, including all debts, demands, stocks, moneys and goods, "due to and owned by the decedent at his death."

The only explanation tendered by respondent for her failure to inventory this stock was the explanation of her attorney herein (who also was attorney for the estate of her husband) that the stock was valueless at the time of the preparation of the inventory. With all respect to the opinion and testimony of the learned counsel for respondent, we submit that the Indiana statute requires the inclusion in the inventory of all stock owned by the decedent at his death. Clearly, this stock had value at the time of the demise of respondent's husband. Moreover, it is not for the administratrix or her attorney to determine whether the stock had value as the statute contemplates the appointment of disinterested appraisers for that very purpose. Therefore, we believe that the tendered excuse is feeble and ill-founded.

The only explanation tendered with respect of respondent's failure, as administratrix, to account for the dividends received in respect of this stock was the assumption by respondent's attorney that it might have been offset against

debts of the decedent paid by the respondent from her own funds. This does not seem probable in that respondent filed her claim in the estate and, presumably, filed that claim to cover all obligations owing her. Secondly, the estate was settled as insolvent and it is not to be presumed that defendant extracted moneys of the estate to prefer herself over remaining creditors of the estate. The Indiana Probate Code, Burns' Indiana Statutes of 1933, Sec. 6-1401, requires that an administrator include in the final report all income derived from the property of the estate. Therefore, the only sound inference arising from these failures is that the respondent did not consider this stock or the income therefrom derived to have been the property of the estate of her deceased husband. By signing the sworn inventory and final account in the estate of her deceased husband from which said stock was omitted, the defendant acquiesced in and ratified her ownership of this stock. *In re Smith's Estate*, 282 Mich. 566, 276 N. W. 554, p. 557.

Conclusion.

It, therefore, is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the decision herein of the Circuit Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Seebirt, Oare & Deahl,

Of Counsel for Petitioner.